United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 08-300**
	)	**Issued: May 9, 2008**
DEPARTMENT OF VETERANS AFFAIRS, CONNECTICUT HEATHCARE SYSTEM, West Haven, CT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 8, 2007 appellant filed a timely appeal from the October 12, 2007 decision of the Office of Workers' Compensation Programs modifying its May 9, 2007 decision and denying his claim on the grounds that he had not established fact of injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an injury on March 24, 2007, as alleged.

FACTUAL HISTORY

On March 30, 2007 appellant, then a 51-year-old maintenance mechanic, filed a traumatic injury claim, Form CA-1, alleging that he injured his lower back on March 24, 2007 as he passed tools down a crawl space. The employing establishment controverted the claim, stating that appellant's disability was not caused by a traumatic injury.

Appellant submitted an April 5, 2006 magnetic resonance imaging (MRI) scan of his lumbar spine that showed a midline annular tear at L4-5 with a small central disc protrusion and a left lateral/foraminal disc protrusion at L3-4, with potential to impinge the left side L3 nerve root.

By decision dated May 9, 2007, the Office denied appellant's claim on the grounds that he had not submitted evidence sufficient to establish that the employment incident occurred as alleged or that he had sustained an employment-related injury.

On July 16, 2007 appellant requested reconsideration. He submitted records from the employee health unit completed by Debbie Simmons, an advanced practice registered nurse. On a progress note dated March 30, 2007, Ms. Simmons reported that appellant was reaching overhead for a container of tools when he felt his lower back "give out." He finished his assignment and then notified his supervisor that he needed to be relieved of duties because of his severe back pain. Ms. Simmons noted tenderness in the lumbosacral paraspinal muscles, full active range of motion and normal reflexes. She found that appellant had sustained a low back strain. Ms. Simmons stated that this condition appeared to be employment related because sprain and strain injuries can be caused by holding an awkward posture while reaching overhead. She noted that appellant had a preexisting bulging disc that was aggravated in the employment incident. Ms. Simmons stated that appellant was totally disabled from March 26 to 30, 2007 and under working restrictions from March 30 to April 9, 2007.

On a March 26, 2007 accident report, Paul Moreau, appellant's supervisor, stated that appellant was working with another mechanic to correct a steam leak on March 24, 2007 at 7:00 a.m. While handling tools and turning, appellant felt a sharp pain in his lower back, which progressively worsened. Appellant returned home at 9:00 a.m.

By decision dated October 12, 2007, the Office modified its May 9, 2007 decision to find that appellant had established an employment incident on March 24, 2007. It found, however, that the medical evidence of record was not sufficient to establish a diagnosis or causal relationship because it was not prepared by a physician.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[2]

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether "fact of injury" has been

[1] 5 U.S.C. §§ 8101-8193.

[2] *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

established. "Fact of injury" consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component of "fact of injury" is whether the incident caused a personal injury and, generally, this can be established only by medical evidence.[3]

When determining whether an employment incident caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a physician.[4] To be rationalized, the opinion must be based on a complete factual and medical background of the claimant[5] and must be one of reasonable medical certainty,[6] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.

ANALYSIS

The Office accepted that appellant felt pain in his back while passing tools to a coworker on March 24, 2007. The issue to be resolved is whether he has established, by probative medical evidence, that he sustained a diagnosed injury causally related to this incident.

In support of his claim, appellant submitted employee health unit records completed on March 30, 2007 by Ms. Simmons, an advanced practice registered nurse. The Board finds that Ms. Simmons is not competent to provide medical opinion evidence under the Act. The Board has held that a medical report may not be considered probative medical evidence unless it can be established that the person completing the report is a "physician" as defined in the Act.[7] The Act defines "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.[8] Because Ms. Simmons is a registered nurse, which is not named in the Act under the definition of "physician," her reports are of no probative value in establishing a diagnosis or causal relationship.[9]

The record contains an April 5, 2006 MRI scan of appellant's lumbar spine, showing a midline annular tear at L4-5 and a left lateral/foraminal disc protrusion at L3-4. The Board notes that this report predates appellant's accepted employment incident and includes no information about causal relationship. It is therefore insufficient to establish appellant's claim.

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[3] *Ellen L. Noble*, 55 ECAB 530 (2004).

[4] *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[5] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *John W. Montoya*, 54 ECAB 306 (2003).

[7] *Thomas L. Agee*, 56 ECAB 465 (2005).

[8] 5 U.S.C. § 8101(2).

[9] *See Janet L. Terry*, 53 EAB 570, n.22 (2002) ("lay individuals such as physician assistants, nurse practitioners and social workers are not competent to render a medical opinion").

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury causally related to his accepted employment incident.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on March 24, 2007, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2007 is affirmed.

Issued: May 9, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board